Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CARLO FERREIRA,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is probable cause required under the Fourth Amendment before a motorist suspected of driving under the influence may be detained to perform field sobriety tests?

2. Is there reasonable and articulable suspicion to believe a motorist has been driving under the influence of alcohol when the only evidence to support such a finding is that the motorist was driving ten miles an hour over the speed limit on a four lane arterial road and he admits to drinking two glasses of wine and a cognac at dinner?

Page

TABLE OF CONTENTS

Questions Presented i

Table Of Authorities iii

Opinion Below 1

Jurisdiction 1

Constitutional Provisions 2

Statement Of The Case 2

Reasons For Granting The Writ 4

I. Certiorari Should Be Granted To Determine An Important Question Of Fourth Amendment Law In Light Of The Split In Authority Among State Courts 4

A. Review Is Appropriate Under S.C.R. 10(b) 4

B. Probable Cause Should be Required for Field Sobriety Tests 5

II. Certiorari Should Be Granted To Determine Whether A Motorist Who Has Been Stopped For Speeding And Shows No Signs Of Impairment Due To Alcohol Consumption, But Who Admits To Having Alcoholic Drinks, May Be Required To Submit To Field Sobriety Tests Even Under The *Terry* Reasonable And Articulable Suspicion Standard 9

Conclusion 13

APPENDICES:

– Appendix A – Decision of Idaho Court of Appeals in *State v. Ferreira* 1a

Page

– Appendix B – Order of Idaho Supreme Court Denying Petition for Review 20a

TABLE OF AUTHORITIES

Federal Cases:

Arizona v. Hicks, 480 U.S. 321 (1987) 7, 8

Minnesota v. Dickerson, 508 U.S. 366 (1993) 8

Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989) 7, 8, 9

Terry v. Ohio, 392 U.S. 1 (1968) 1, 6, 9, 10, 13

United States v. Dionisio, 410 U.S. 1 (1973) 7

United States v. Walker, 933 F.2d 812 (10th Cir. 1991), *cert. denied*, 302 U.S. 1093 (1992) 11

State Cases:

Jones v. State, 459 So.2d 1068 (Fla. App. 2 Dist. 1984), *affirmed*, 483 So.2d 433 6

People v. Carlson, 677 P.2d 310 (Colo. 1984) 5, 6

State v. Carr, 911 P.2d 774 (Id. App. 1995) 12

State v. Ferreira, 988 P.2d 700 (Id. App. 1999) 1

State v. Nagel, 880 P.2d 451 (Or. 1994) 5, 6

State v. Superior Court, 718 P.2d 171 (Ariz. 1986) 4

State v. Woolery, 775 P.2d 1210 (Idaho 1989) 12

Page

Federal Statutes:

28 U.S.C. §1257 2

State Statutes:

Idaho Code §18-8002(3)(b) 3

Idaho Code §18-8002(4)(a) 1, 4

Idaho Code §18-8004(1)(a) 10

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Carlo Ferreira, pursuant to Supreme Court Rules 10 and 12, respectfully prays that a writ of certiorari issue to review the August 5, 1999, decision of the Court of Appeals for the State of Idaho. A Petition for Review of this decision was denied by the Idaho Supreme Court on November 16, 1999.

OPINION BELOW

In Idaho, a motorist who refuses to submit to a breath test for alcohol concentration will have his driver's license suspended for 180 days, unless the court finds there was not "legal cause" to stop and request the motorist to take the breath test or that the motorist's "civil rights" were violated. Idaho Code §18-8002(4)(a). Idaho Courts have interpreted the statutory terms "legal cause" and "civil rights" to include Fourth Amendment requirements. In this case, the Idaho Magistrate Court found that Petitioner's Fourth Amendment rights were not violated under *Terry v. Ohio,* 392 U.S. 1 (1968), and affirmed the driver's license suspension. This decision was affirmed by the Idaho District Court and by the Idaho Court of Appeals. *State v. Ferreira,* 988 P.2d 700 (Id. App. 1999) (Appendix A). Mr. Ferreira filed a Petition for Review in the Idaho Supreme Court which was denied on November 16, 1999. (Appendix B.)

JURISDICTION

The order denying Mr. Ferreira's Petition for Review to the Idaho State Supreme Court was entered on November 16, 1999. This Petition for Writ of Certiorari is timely because it is being filed within ninety days of that

date, pursuant to S.C.R. 13(3). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

The **Fourth Amendment to the United States Constitution** provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated.

The **Fourteenth Amendment to the United States Constitution** provides in pertinent part:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On August 21, 1997, at 1:12 a.m., Officer Jay Brannan of the Garden City, Idaho, Police was headed north on a four-lane bridge over the Boise River. He saw Mr. Ferreira's Ferrari convertible on the bridge with the top down going approximately 45 miles per hour. The place where Officer Brannan saw the Ferrari is a 35 miles per hour zone. However, it quickly becomes a 45 miles per hour zone and at the point where Officer Brannan saw Mr. Ferreira the 45 miles per hour sign was clearly visible to Mr. Ferreira. The sign is at the southwest corner of Marigold and Glenwood, approximately 100 feet away. Officer Brannan looked at his radar unit and saw a display of 47 miles per hour. Radar contact with the Ferrari lasted only one to four seconds.

Officer Brannan made a U-turn and activated his emergency lights. Mr. Ferreira stopped immediately just across from the Boise Hawks stadium. No allegations

were ever made of any driving violations other than this minor speeding.

Officer Brannan asked Mr. Ferreira if he knew what the speed limit was on the bridge. Mr. Ferreira correctly answered that it was 35 miles per hour. Then Mr. Ferreira told Officer Brannan he thought he had been within the speed limit. When told that he had been going 47 miles per hour, Mr. Ferreira apologized and stated that he must have touched the gas.

Officer Brannan detected an odor of alcohol and asked Mr. Ferreira if he had been drinking. Mr. Ferreira responded that while at dinner he had two glasses of wine and a glass of cognac. Despite the hour of 1:12 a.m., Officer Brannan apparently did not ask how long ago Mr. Ferreira had eaten dinner. Instead, Officer Brannan had Mr. Ferreira get out of the automobile and perform field sobriety tests.

Officer Brannan then arrested Mr. Ferreira for Driving Under the Influence and took him to jail. At the jail, an advisory form was read to Mr. Ferreira. He stated that he did not understand part of it and wanted to speak with an attorney. He also stated that he wanted to take a blood test rather than a breath test. In response to this, Officer Brannan told Mr. Ferreira that he did not have a right to talk to an attorney, that he had to take the breath test, that he had no other rights and that he had just refused to take the test. Officer Brannan thereupon left.

Under Idaho law, a driver who does not take a requested breath test will have his driver's license automatically suspended unless he can "show cause" to the court why he did not take the test. Idaho Code §18-8002(3)(b). One of the ways to show cause under the statute is to show

the officer did not have "legal cause" to request the breath test or that the request violated the motorist's "civil rights." Idaho Code §18-8002(4)(a). Mr. Ferreira argued at the show cause hearing that there was no legal cause to request the breath test and his civil rights were violated because the results of the field sobriety tests were obtained in violation of the Fourth Amendment.

As noted above, the Idaho Courts held that Mr. Ferriera's Fourth Amendment rights were not violated in this case because: 1) only reasonable and articulable suspicion is needed before an officer may detain a motorist to administer field sobriety tests and 2) the officer had reasonable and articulable suspicion to believe Mr. Ferriera was driving under the influence of alcohol. This Court should review that decision for the reasons set forth below.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE AN IMPORTANT QUESTION OF FOURTH AMENDMENT LAW IN LIGHT OF THE SPLIT IN AUTHORITY AMONG STATE COURTS.

A. Review Is Appropriate Under S.C.R. 10(b).

In this case, the Idaho Court of Appeals held that under the Fourth and Fourteenth Amendments a driver may be detained for the purposes of administering field sobriety tests based only upon reasonable and articulable suspicion. This holding is in accord with an opinion from a state court of last resort, *State v. Superior Court*, 718 P.2d 171, 176 (Ariz. 1986), but in conflict with opinions of the Colorado and Oregon Sup-

reme Courts. *People v. Carlson*, 677 P.2d 310 (Colo. 1984) (probable cause required); *State v. Nagel*, 880 P.2d 451 (Or. 1994) (same). Therefore, certiorari is appropriate because "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort." S.C.R. 10(b).

B. Probable Cause Should Be Required For Field Sobriety Tests.

The Colorado Court, in finding that probable cause is required, wrote:

> [a] roadside sobriety test involves an examination and evaluation of a person's ability to perform a series of coordinative physical maneuver, not normally performed in public or knowingly exposed to public viewing, for the purpose of determining whether the person under observation is intoxicated. Since these maneuvers are those which the ordinary person seeks to preserve as private, there is a constitutionally protected privacy interest in the coordinative characteristics sought by the testing process. Although some forms of governmental intrusions are so limited in scope as to be justified on a lower quantum of evidence than probable cause [citation omitted], a roadside sobriety test does not fall into this category.
>
> Roadside sobriety testing constitutes a full "search" in the constitutional sense of that term and therefore must be supported by probable cause. The sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct on the part of the suspect. Intrusions into privacy for the exclusive purpose o gathering evidence of criminal activity have traditionally required, at the outset of the

> intrusion, probable cause to believe the offense has been committed. [citations omitted] . . . Indeed, in some respects, roadside sobriety tests might be considered more invasive of privacy interests than chemical testing. The latter is performed in the relatively obscure setting of a station house or hospital, while roadside sobriety tests will often take place on or near a public street with the suspect exposed to the full view of motorists, pedestrians, or anyone else who happens to be in the area. Were this type of intrusive search to be permitted on less than probable cause, the "exception" created by *Terry* and its progeny would swallow up the general rule that searches and seizures are reasonable only if based on probable cause.

People v. Carlson, 677 P.2d at 317.

In addition to Colorado, Oregon and Florida also require probable cause. *Jones v. State*, 459 So.2d 1068, 1080 (Fla. App. 2 Dist. 1984), *affirmed*, 483 So.2d 433 (probable cause to believe that driver is under the influence of alcohol must exist before police can conduct more extensive investigation such as asking the motorist to exit the car for a roadside sobriety test); *State v. Nagel, supra* (probable cause required for field sobriety tests because they constitute a search).

The Idaho Court of Appeals disagreed with the Colorado and Oregon Supreme Courts because, in its opinion, field sobriety tests are not searches, but rather merely a *Terry*-type "investigative stop" requiring only reasonable and articulable suspicion. Mr. Ferreira respectfully suggests that the Court of Appeals opinion mischaracterizes field sobriety tests because a *Terry* stop merely freezes the situation in order to permit an officer to make reasonable inquiries into suspicious circumstances. Field

sobriety tests go far beyond that. As the Oregon Supreme Court noted:

> There are at least two reasons why the field sobriety tests administered in this case are counter to a reasonable expectation of privacy. First, the tests require defendant to perform certain maneuvers that are not regularly performed in public. Unlike the quality of one's voice or one's handwriting, people do not regularly display that type of behavior to the public – there is no reason to believe that motorists regularly stand alongside a public road reciting the alphabet, count backward from 107, stand upon one leg while counting from 1001 to 1030, or walk a line, forward and back, counting steps and touching heal to toe. *Compare United States v. Dionisio*, 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973) (no expectation of privacy in a voice exemplar because a person's "voice is repeatedly produced for others to hear") *with Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989) (person has expectation of privacy in urine testing because urinating ordinarily is not done in public).
>
> The United States Supreme Court's decision in *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), also is instructive. In that case, police officers entered an apartment after a bullet was fired through the floor. 480 U.S. at 323, 107 S.Ct. at 1151. The original entry into the apartment was reasonable based upon probable cause and exigent circumstances. *Id.* at 324, 107 S.Ct. at 1152. While the police were in the apartment, one officer noticed some stereo equipment that seemed out of place. *Id.* at 323, 107 S.Ct. at 1151. He moved some of the equipment in order to observe and record its serial numbers. *Id.*

The Court held that the police officer had conducted a search, because moving the stereo equipment, "which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy." *Id.* at 325, 107 S.Ct. at 1152.

In a similar way, field sobriety tests expose to police view things that are not obvious through passive observation of the suspected person. In this case, the officer required defendant to perform certain acts that exposed otherwise concealed information about defendant, constituting an invasion of defendant's privacy. *Cf. Minnesota v. Dickerson*, 508 U.S. 366, ___ , 113 S.Ct. 2130, 2138, 124 L.Ed.2d 334 (1993) (privacy interest implicated when, during a patdown search, officer relied on sense of touch to find contrband even after determining that the container found on defendant did not hold a weapon.

Secondly, defendant has a reasonable expectation of privacy in the information that the officer obtained through the field sobriety tests. Field sobriety tests seek to elicit evidence of a person's coordination, psychological condition, and physical capabilities. The Supreme Court has held that urine testing is a search under the Fourth Amendment, not only because of the intrusive collection process, but also because of the nature of the information revealed by testing the sample. *Skinner v. Railway Labor Executives' Assn., supra,* 489 U.S. at 617, 109 S.Ct. at 1413. In that case, the Court stated: "[C]hemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic." *Id.* In the same way, a field sobriety test may reveal evidence of equally private facts about an individual, including whether the individual is illiterate, has Alzheimer's disease, or suffers from

> multiple sclerosis. As the Supreme Court recognized in *Skinner*, a defendant has a reasonable expectation of privacy in that type of information. Accordingly, there are constitutionally protected privacy interests implicated both in the process of conducting field sobriety tests and in the information disclosed by the tests – the administration of field sobriety tests constitutes a search under the Fourth Amendment to the United States Constitution.

880 P.2d at 458.

In sum, field sobriety tests are more intrusive than normal traffic stops because they require motorists to demonstrate their physical skills and disabilities to the officer and anyone else who may pass by. At the same time they are common throughout the United States with hundreds ofthem being administered every day. Therefore review is appropriate because the question presented is one of great public importance which should be conclusively resolved, especially considering the conflict between the state courts over what Fourth Amendment standard to apply.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A MOTORIST WHO HAS BEEN STOPPED FOR SPEEDING AND SHOWS NO SIGNS OF IMPAIRMENT DUE TO ALCOHOL CONSUMPTION, BUT WHO ADMITS TO HAVING ALCOHOLIC DRINKS, MAY BE REQUIRED TO SUBMIT TO FIELD SOBRIETY TESTS EVEN UNDER THE *TERRY* REASONABLE AND ARTICULABLE SUSPICION STANDARD.

After holding that probable cause was not required, the Idaho Court of Appeals went on to hold that the police officer had sufficient cause under *Terry* to justify the administration of the field sobriety tests. The Court of

Appeals found that speeding along with an admission of drinking three alcoholic beverages over an unknown period of time constituted a reasonable and articulable suspicion that Mr. Ferreira was Driving Under the Influence, even when there was absolutely no evidence that his driving was impaired by alcohol. This conclusion is in error and this Court should correct it, if it finds that reasonable and articulable suspicion is the correct standard under the Fourth Amendment.

To stop someone for purposes of investigating possible criminal behavior, the police must have at a minimum reasonable suspicion, based on the totality of the circumstances that the person stopped has committed or is about to commit a crime. *Terry v. Ohio,* 392 U.S., at 22. And, in Idaho, as with the rest of the country, it is not a crime to drive after drinking an alcoholic beverage. It is only a crime if the motorist's driving is affected by the alcohol.[1] Thus, in this case, while Officer Brannan could legally ticket Mr. Ferreira for speeding, he could not, consistent with the Fourth Amendment expand the stop by having Mr. Ferreira get out of his car and perform field sobriety tests because had had no reasonable suspicion that Mr. Ferreira was otherwise in violation of the laws of the state.

In this vein, the Tenth Circuit held that the permissible scope of a *Terry* stop had been exceeded when the police officer, who had stopped the defendant for speeding, continued to detain the defendant to ask questions about

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[1] Idaho Code §18-8004(1)(a) provides that it shall be "unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances . . . to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge or upon public or private property open to the public."

guns and drugs after the defendant had produced a valid driver's license and proved he was entitled to operate the car. *United States v. Walker,* 933 F.2d 812 (10th Cir. 1991), *cert. denied,* 302 U.S. 1093 (1992):

> Instead of issuing a citation, Officer Graham decided to detain the defendant and conduct an inquiry into matters unrelated to the traffic stop. . . . Once the driver has produced a valid license and proof he is entitled to operate the car, he must be allowed to go on his way, without being subject to further delay by the police for additional questioning. [citation omitted] In this case, the detention of the defendant unreasonably extended beyond the length necessary for the issuance of the citation. The officer detained the defendant to ask him questions unrelated to the speeding infraction or to the defendant's right to operate the car. Thus, the detention was not reasonably related in scope to the circumstances that justified the interference in the first place. As such it was an unreasonable seizure under the Fourth Amendment.

Walker, 933 F.2d at 816 (citation and internal quotation marks omitted).

When Officer Brannan stopped Mr. Ferreira, Mr. Ferreira had admittedly gone 47 miles per hour for at least 3 or 4 seconds in a 35 mile per hour zone. However, Mr. Ferreira was within 100 feet of a 45 mile per hour zone and his speeding violation, while a traffic violation, did not indicate that Mr. Ferreira was not in full control of his car or that he was driving erratically or even unexpectedly. Probably there is no driver in Idaho who does not begin to accellerating to a new higher speed limit upon viewing, but before actually passing, the new higher speed limit sign.

Furthermore, there was nothing about Mr. Ferreira's driving pattern which indicated intoxication. He did not weave in his lane, or hug the fog line, he did not fail to see the police car or pull over in a safe and expedient manner, he did not fail to turn on his lights or use his signal lights inappropriately, nor did he vary his speed erratically. He did nothing but go a bit over the speed limit. Everything about his driving indicated a driver in control of his car and not under the influence of drugs or alcohol.

Even after he was stopped by the officer, there was no evidence that Mr. Ferreira was under the influence of alcohol. He did not become confused by Officer Brannan's instructions and requests. He knew the speed limit where he was stopped. His speech was not slurred. His motor skills were not impaired, as evidenced by his ability to quickly and easily get and turn over his registration and insurance information. And, while Mr. Ferriera told the officer that he had two glasses of wine at dinner and a glass of cognac after dinner, it was 1:12 a.m. and Officer Brannan did not ask when dinner was eaten or when the after-dinner drink was consumed. For all the officer knew, Mr. Ferreira ate dinner some six to seven hours before his car was stopped. If that were the case, the passage of time made it extremely unlikely that the alcohol could impair his driving to the level of being illegal.[2] So, even Mr. Ferreira's admissions of having consumed some alcohol in the past did not give

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[2] It has been judicially noted by the Idaho appellate courts that alcohol, once consumed, begins to be metabolized by the body and the amount of alcohol in the blood will decrease over time and eventually dissipate. *State v. Woolery*, 775 P.2d 1210, 1214 (Idaho 1989); *State v. Carr*, 911 P.2d 774, 777 (Id. App. 1995).

Officer Brannan reasonable and articulable suspicion that Mr. Ferreira was driving under the influence of the alcohol at the time of the stop.

The Idaho Courts' opinion should be reviewed under S.C.R. 10(c) because it permits a seizure of a motorist and a search based upon nothing more than a mere hunch of illegal activity in violation of this Court's teaching in *Terry v. Ohio, supra.*

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the decision of the Idaho Court of Appeals.

Respectfully submitted this 14th day of February, 2000.

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APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF IDAHO

Docket No. 25882

1999 Opinion No. 54

Filed: August 5, 1999
Frederick C. Lyon, Clerk

STATE OF IDAHO,

Plaintiff-Respondent.

v.

CARLO FERREIRA,

Defendant-Appellant.

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon, Robert G. Newhouse, District Judge. Hon. Timothy L. Hansen, Magistrate.

Order of the district court, on appeal from the magistrate's order suspending driver's license, *affirmed.*

Nevin, Herzfeld & Benjamin, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Alan G. Lance, Attorney General, Alison A. Stieglitz, Deputy Attorney General, Boise, for respondent. Alison A. Stieglitz argued.

PERRY, Chief Judge

Carlo Ferreira appeals from the district court's decision affirming the magistrate's order suspending Ferreira's driver's license for refusal to submit to a breath test. I.C. §18-8002(4). For the reasons set forth below, we affirm.

I.
BACKGROUND

On August 31, 1997, at approximately 1:12 a.m., a Garden City police officer observed a vehicle traveling in excess of the posted 35 mph speed limit. The officer visually estimated the vehicle's speed to be 45 mph, which was subsequently confirmed by a radar unit to be 47 mph. The officer effectuated a traffic stop of the vehicle.

The officer approached the vehicle and asked the driver for his license, registration, and proof of insurance. The driver verbally identified himself as Ferreira and produced his registration and proof of insurance. Ferreira did not have his driver's license with him at the time of the stop. During this exchange, the officer detected an odor of alcohol and asked Ferreira if he had been drinking. Ferreira responded that when dining he had consumed two glasses of wine and a glass of cognac. The officer asked Ferreira to exit and step behind his vehicle so that field sobriety tests could be performed. Ferreira performed the tests. He obtained a maximum of six points on the horizontal gaze nystagmus test. He also swayed and placed his foot onto the ground while performing the one-leg stand test. Finally, during the heel-toe walking test, Ferreira could not remain in the heel-toe position during the instructional phase of the test, missed several heel-toe steps, raised his arms over six

inches, took the wrong number of steps, and made an improper turn. Based on these observations, the officer determined that Ferreira was driving under the influence of alcohol and arrested him.

After transporting Ferreira to jail, the officer read Ferreira the I.C. §18-8002(3) blood alchol investigation advisory form. Ferreira stated that he did not understand that he had no right to consult with an attorneys and requested that he be permitted to do so. The officer informed Ferreira that, under Idaho law, he did not have the right to speak with an attorney before submitting to the breath test. The officer then offered Ferreira a breath test, and Ferreira stated that he wished to have a blood test drawn. After the officer informed Ferreira that he could have an independent blood test drawn at his own expense, following the breath test, Ferreira refused to submit to a breath test, stating that he was "not given . . . the right to talk to my lawyer or my due process." As a consequence of Ferreira's refusal of the breath test, the officer seized Ferreira's driver's license as authorized by I.C. §18-8002(4)(1).

Ferreira requested a hearing pursuant to I.C. §18-8002(4)(b) to show cause why his driver's license should not have been suspended. At the conclusion of the hearing, the magistrate ruled that Ferreira had failed to satisfy his burden under the statute and ordered his license suspended. Ferreira appealed to the district court, which affirmed. Ferreira again appeals.

II.
DISCUSSION

On review of a decision of the district court, rendered in its appellate capacity, we examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision. *Hentges v. Hentges,* 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct. App. 1998).[1]

The hearing conducted below was a show cause hearing pursnant to I.C. §18-8002(4), wherein Ferreira argued that his civil rights were violated by the officer's request that Ferreira perform the field sobriety tests. Therefre, the show cause hearing was a *de facto* supression hearing. The standard of review of a suppression motion is bifurcated. When a decision on the motion to suppress is challenged, we accept the trial court's findings of fact which were supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson,* 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996).

Ferreira does not challenge the factual findings of the magistrate or the propriety of the initial traffic stop by the officer. He does challenge, however, the performance of the field sobriety tests on both state and federal constitutional grounds. The threshold issue raised by Ferreira's appeal is what standard – probable cause or reasonable suspicion– is required before an officer may administer field sobriety tests. Ferreira contends that probable cause should be required under both the United

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[1] In light of this standard of review, it is unnecessary for the Court to address Ferreira's assertion that the district court erred in not ruling on his constitutional claims.

States and Idaho Constitutions. He argues that the question with regard to the federal constitution is unsettled in Idaho and that the question with regard to the state constitution is one of first impression. Additionally, Ferreira asserts that, even if only reasonable suspicion is required, the officer did not possess such suspicion before he administered the field sobriety tests.

Idaho Code Section 18-8004 states, in relevant part:

> (1)(a) It is unlawful for any person who is under the influence of alcohol, drugs, or any other intoxicating substances, or who has an alcohol concentration of 0.08, . . . or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon a public or private property open to the public.

With this statute in mind, we turn to Ferreira's arguments.

A. Fourth Amendment

Ferreira contends that the Fourth Amendment requires probable cause to believe a driver is operating his or her vehicle in violation of I.C. §18-8004 before field sobriety tests can be administered.[2] Ferreira's argument

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[2] Ferreira argues that Idaho has previously decided that the Fourth Amendment requires probable cause before field sobriety tests may be administered, and relies on *State v. Reichenberg*, 128 Idaho 452, 915 P.2d 14 (1996) and *State v. Armbruster*, 117 Idaho 19, 784 P.2d 349 (Ct. App. 1989). However, *Reichenberg* was a case wherein the Supreme Court addressed the appellant's double jeopardy argument and, in *dicta*, stated that the officer had probable cause to administer field sobriety tests. Additionally, in *Armbruster*, this Court specifically declined to decide whether the field sobriety tests constituted an illegal search and seizure. Thus,

[footnote continued]

essentially states that because his reasonable expectation of privacy was intruded upon by the field sobriety tests, probable cause is required before such tests may be administered. Ferreira contends that field sobriety tests require the driver to perform maneuvers that are not regularly shown in public and expose to police and public view things that are not obvious through passive observation of a person. He asserts, therefore, that the law should require that an officer possess probable cause before field sobriety tests may be administered.

A seizure occurs – and the Fourth Amendment is implicated – when an officer, by means of physical force or show of authority, has in some way restrained a citizen's liberty. *State v. Fry*, 122 Idaho 100, 103, 831 P.2d 942, 944 (Ct. App. 1991). The critical inquiry is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. *Id.* at 104, 831 P.2d at 945. When an officer administers field sobriety tests, the driver of the vehicle is not free to ignore the officer's request. Thus, there can be no doubt that the Fourth Amendment to the United States Constitution was implicated by the administration of field sobriety tests in the instant case.

However, Ferreira's contentions are only the beginning of the analysis. In order for the Court to address the quantum of suspicion required before an officer may administer field sobriety tests, it must first give constitutional dimension to such an encounter between police

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we are not persuaded by Ferreira's assertion that Idaho courts have held that the Fourth Amendment requires probable cause that a driver is in violation of I.C. §18-8004 before field sobriety tests may be administered.

and the citizens of this state. Although there are three categories of encounters between citizens and the police, *State v. Knapp,* 120 Idaho 343, 346, 815 P.2d 1083, 1086 (Ct. App. 1991), for the purposes of his appeal, we are concerned with but two – an arrest and investigave detention. An arrest is characterized as a full-scale seizure of the person requiring probable cause. *State v. Zapp,* 108 Idaho 723, 726-27, 701 P.2d 671, 674-75 (Ct. App. 1985). An investigative detention is characterized as a seizure of limited duration which, when supported by a reasonable suspicion of criminal activity, falls within a judicially created exception to the probable cause requirement. *Id.*

A search without a warrant is per se unreasonable unless it falls within one of the exceptions to the Fourth Amendment requirements. *Coolidge v. New Hampshire,* 403 U.S. 443, (1971); *Katz v. United States,* 389 U.S. 347 (1967); *State v. Simmons,* 120 Idaho 672, 676, 818 P.2d 787, 791 (Ct. App. 1991). One of the exceptions is when the police validly stop a person to investigate possible criminal behavior, even there is no probable cause to make an arrest. *Terry v. Ohio,* 392 U.S. 1 (1968); *Simmons,* 120 Idaho at 676, 818 P.2d at 791. Such an investigative stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *United States v. Cortez,* 449 U.S. 411, 417 (1981); *Knapp,* 120 Idaho at 347, 815 P.2d at 1087. Put differently, an investigatory or *Terry* stop is justified under the Fourth Amendment if there is a reasonable and articulable suspicion that the person has committed or is about to commit a crime. *Florida v. Royer,* 460 U.S. 491 (1983); *Adams v. Williams,* 407 U.S. 143, 146 (1972); *Simmons,* 120 Idaho

at 676, 818 P.2d at 791. In sum, the Idaho Supreme Court has held:

> An individual who is accosted by a police officer and has his freedom to walk away restrained has been seized. Not all seizures of the person need be justified by probable cause to arrest for a crime; a police officer may, in appropriate circumstances and in an appropriate manner, detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.
>
> Such a seizure is justified under the Fourth Amendment if there is an articulable suspicion that the person has committed or is about to commit a crime.

State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992) (citations omitted).

The factors to be considered in distinguishing an investigative stop from a de facto arrest include the seriousness of the crime, the location of the encounter, the length of the detention, the reasonableness of the officer's display of force, and the conduct of the suspect as the encounter unfolds. *State v. Martinez,* 129 Idaho 426, 431, 925 P.2d 1125, 1130 (Ct. App. 1996). The Idaho Supreme Court has previously held that "[w]ithout question, the drunk driver is one of society's greatest concernt." *State v. Henderson,* 114 Idhao 293, 295, 756 P.2d 1057, 1059 (1988). The *Henderson* Court held that the state has a "vital interest in promoting public safety by reducing alcohol-related traffic accidents and by ensuring the fitness of drivers behind the wheel." *Id.* The state's interest in stopping drunk driving is "compelling," because protecting citizens from life-threatening danger is a "paramount concern." *Id.* at 296, 756 P.2d at 1060. Thus, drunk driving is a serious crime.

Field sobriety tests are, by their very definition, done in the "field" typically on the side of a public thoroughfare and are ordinarily performed contemporaneously with a traffic stop. In the instant case, upon stopping Ferreira for speeding, the officer noticed the odor of alcohol and inquired as to Firreira's alcohol consumption that evening. After being informed that Ferreira had ingested two glasses of wine and a cognac, the officer requested that Ferreira exit the car and perform field sobriety tests. Those tests were performed immediately thereafter. Finally, although Ferreira testified that he did not believe he could refuse the request, that does not elevate the detention into a de facto arrest. In any investigative detention the individual is not free to leave; that element of compulsion is what distinguishes an investigative detention from a consensual encounter. *See Fry,* 122 Idaho at 102-03, 831 P.2d at 944-45. Therefore, we conclude that the administration of field sobriety tests following a traffic stop is but an investigative detention.

To determine whether search conducted within an investigatory detention is reasonable, and, therefore, constitutionally permissible, the Court must balance the state's interest in conducting the search against the level of intrusion into an individual's privacy that the search entails. *See State v. Reed,* 129 Idaho 503, 505, 927 P.2d 893, 895 (Ct. App. 1996) (The permissibility of a particular law enforcement practice is judged by balancing its intrusion upon the individuals's Fourth Amendment interests against its promoion of legitimate governmental interests.). As we have stated above, the state's interest in stopping drunk driving is compelling, and the protection of its citizens from life-threatening danger is of paramount concern. *Henderson,* 114

Idaho at 296, 756 P.2d at 1060. An individual's privacy is certainly intruded upon by the administration of field sobriety tests. However, the state's interest overwhelming outweighs the intrusion into a driver's privacy and, thus, we hold that field sobriety tests are reasonable methods of conducting an investigation, based on specific and articulable facts that a driver is operating his or her vehicle contrary to I.C. §18-8004.

Moreover, this Court has previously held that the Fourth Amendment requires only reasonable suspicion that a driver is driving while under the influence before an officer may request a driver to perform field sobriety tests. *See State v. Pick*, 124 Idaho 601, 605, 861 P.2d 1266, 1270 (Ct. App. 1993) (Field sobriety tests are a form of a *Terry* stop and, thus, when such tests were requested, the officer was required to have, and had, a reasonable, articulable suspicion that Pick was in physical control of a motor vehicle while under the influence of alcohol.); *State v. Jordan*, 122 Idaho 771, 775, 839 P.2d 38, 42 (Ct. App. 1992) (Officers had reasonable, articulable suspicion that the driver may have been driving under the influence and, thus, were authorized to ask him to pull over and perform field sobriety tests.). Therefore, we hold again today, based on established precedent and thorough analysis, that the Fourth Amendment to the United States Constitution requires only that an officer possess reasonable suspicion that a driver is operating a vehicle contrary to I.C. §18-8004 before field sobriety tests may be administered.

B. Idaho Constitution

Ferreira next claims that the Idaho Constitution should require probable cause before an officer may request a driver to perform field sobriety tests. He con-

tends that such a tests are "full-blown searches." Article I, Section 17 of the Idaho Constitution states, in relevant part, that the "right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated."

> The language of Article I, Section 17 of the Idaho Constitution closely parallels that of the Fourth Amendment. This similarity in language, however, does not require this Court to follow United States Supreme Court precedent in interpreting our own constitution. "The reason is the federal and state constitutions derive their power from independent sources. It is thus readily apparent that state courts are at liberty to find within the provisions of their own constitutions greater protection than is afforded under the federal constitution as interpreted by the United States Supreme Court. This is true even when the constitutional provisions implicated contain similar phraseology. Long gone are the days when state courts will blindly apply United States Supreme Court interpretation and methodology when in the process of interpreting their own constitutions."

State v. Christensen, 131 Idaho 143, 146, 953 P.2d 583, 586 (1993), *quoting State v. Newman,* 108 Idaho 5, 10 n.6, 696 P.2d 856, 861, n.6 (1985). In *State v. Cada,* 129 Idaho 224, 230, 923 P.2d 469, 475 (Ct. App. 1996), this Court recognized that such independent state analysis does not mean that the Court will reach a result different from the United States Supreme Court; it only means that we are free to do so, if it is determined that a different rule better effectuates our counterpart Idaho constitutional provision.

Generally, like its Fourth Amendment counterpart, Article I, Section 17 of the Idaho Constitution prohibits

unreasonable searches and seizures. *Simmons*, 120 Idaho at 676, 818 P.2d at 791. Warrantless searches are deemed to be "per se unreasonable" and the burden is upon the state to demonstrate that the search was carried out pursuant to one of the exceptions to the warrant requirement. *State v. Cook*, 106 Idaho 209, 214, 677 P.2d 522, 527 (Ct. App. 1984). A *Terry* stop is a recognized investigative method under the Idaho Constitution. *State v. Johns*, 112 Idaho 873, 736 P.2d 1327, 1331 (1987) (Under *Terry* and Idaho law, limited stops can be made for investigative purposes.). Such an investigative stop is an "intermediate response" that allows an officer, who lacks probable cause to make an arrest, to *actively* investigate possible criminal behavior. *Cook*, 106 Idaho at 214, 677 P.2d at 527.

Ferreira relies on decisions of the Oregon and Colorado Supreme Courts in support of his contention that the Idaho Constitution should require probable cause before field sobriety tests may be administered. Ferreira cites *State v. Nagel*, 880 P.2d 451 (Or. 1994), wherein the Oregon Supreme Court held that under both the Oregon and United States Constitutions, roadside field sobriety tests constitute a search and require probable cause that a driver is DUI before the tests may be conducted. *Id.* at 458. In *People v. Carlson*, 677 P.2d 310 (Colo. 1984), the Colorado Supreme Court similarly held that roadside field sobriety tests are a "full" search and thus must be supported by probable cause under both the federal and state constitutions. In so holding, the *Carlson* Court stated that the "sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct on the part of the suspect." *Id.* at 317. We disagree with the characterization of field sobriety tests made by the *Carlson* Court. Indeed, the *dual* purposes

of roadside field sobriety tests are to *either* confirm *or* dispel the police officer's suspicion that the driver is operating his or her motor vehicle contrary to the law. Thus, if the individual performs the field sobriety tests in such a manner as to dispel the officer's suspicions, absent other unique circumstances, the driver will be left to go on his or her way.

Having adopted *Terry* and its progeny and this state under the Idaho Constitution, we find no reason to abandon that doctrine today. Additionally, it is "generally accepted that a driver stopped on reasonable suspicion of driving under the influence may be subjected to [ ] field sobriety test[s], consisting of examination of his mental and physical dexterity." 4 WAYNE R. LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, §9.2(f), at 54 n.146 (3d ed. 1996). In *Hulse v. State, Dep't of Justice, Motor Vehicle Division*, 961 P.2d 75 (Mont. 1998), the Montana Supreme Court determined that under both the federal and Montana constitutions, field sobriety tests, although searches, required only reasonable suspicion of intoxication before such tests could be administered. The *Hulse* Court stated:

> Because we recognize that field sobriety tests, like investigative stops, are important investigative tools used by police officers to determine whether probable cause for arrest exists, we also acknowledge that to require probable cause that an individual has been driving under the influence before allowing police officers to administer field sobriety tests would defeat the very purpose of these tests.

Id. at 86-87. We find the reasoning of the *Hulse* Court both compelling and sound. Moreover, in addition to Montana, at least fifteen other jurisdictions have adopted

the rule that probable cause is not required before a law enforcement officer administers field sobriety tests. *See, e.g., State v. Superior Court,* 718 P.2d 171, 176 (Ariz. 19860; *State v. Lamme,* 563 A.2d 1372, 1374 (Conn. App. Ct. 1989), *aff'd* 579 A.2d 484 (Conn. 1990); *State v. Taylor,* 648 So.2d 701, 703 (Fla. 1995); *Dixon v. State,* 737 P.2d 1162, 1163-64 (Nev. 1987); *People v. Califano,* 680 N.Y.S.2d 700, 701 (N.y. App. Div. 1998). Thus, *Nagel* and *Carlson,* cited by Ferreira, enunciate what is clearly a minority view.

Furthermore, Ferreira's argument that an officer should be required to possess probable cause before field sobriety tests can be adminstered would render the "per se" section of I.C. §18-8004 a virtual nullity. In Idaho, the legislature has seen fit to criminalize driving while under the influence in two distinct ways. Idaho Code Section 18-8004 states, in relevant part, that it "is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, *or* who has an alcohol concentration of 0.08 . . . or more . . . to drive or be in actual physical control of a motor vechile." (Emphasis added.). Thus, I.C. §18-8004 provides for one crime, with two alternative methods of proof. *See State v. Cheney,* 116 Idaho 917, 919, 782 P.2d 40, 42 (Ct. App. 1989) (Discussing the former version of I.C. §18-8004.). Field sobriety tests are a necessary investigative tool, for police officer who suspects that a driver has an alcohol level of .08 or greater but is not "under the influence of alcohol," to establish probable cause that the driver is violating the per se limit of .08 contained within I.C. §18-8004.

We hold, therefore, that Article I, Section 17 of the Idaho Constitution requires only that a police officer possess reasonable suspicion that a person is driving in

violation of I.C. §18-8004 before field sobriety tests may be administered.

C. Least Intrusive Means

The investigative methods utilized during an investigative seizure should be the least intrusive means *reasonably* available to verify or dispel the officer's suspicion in a short period of time. *State v. Martinez,* 129 Idaho 426, 430, 925 P.2d 1125, 1129 (Ct. App. 1996). During appellate oral argument Ferreira asserted that field sobriety tests are not the least intrusive method that an officer can use to confirm or dispel his suspicion that the driver is driving while under the influence. Ferreira contended that a reasonable investigative method, when an officer suspects a driver is operating his or her vehicle while under the influence, would be to simply inquire further of the driver while the officer stands on the side of the road and the driver is seated in the vehicle. We disagree.

In *Pennsylvania v. Mimms,* 434 U.S. 106 (1977), the United States Supreme Court held that once a motor vehicle has been lawfully detained for a traffic violation, the police officer may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures. This rule has been followed in Idaho. *See Sprague v. City of Burley,* 109 Idaho 656, 664, 710 P.2d 556, 574 (1985). In *Mimms,* the Supreme Court focused on the danger posed to the officer from both the driver and passing traffic. *Mimms,* 434 U.S. at 110-11. Recently, the United States Supreme Court extended its holding in *Mimms* to passengers. *Maryland v. Wilson,* 519 U.S. 408, 414 (1997). The *Wilson* Court again focused on the danger posed to the officer during a lawful traffic

stop in reaching its decision. *Id.* at 413. Based on the holdings of *Mimms* and *Wilson,* an officer can order the driver and/or the passenger out of a lawfully stopped vehicle. Thus, it stands to reason that when an officer suspects that the driver of a lawfully stopped vehicle is driving contraro to I.C. §18-8004, the officer is not required to stand on the roadside and question the driver further while the driver remains seated inside the vehicle.

Additionally, Ferreira's own contention that there was no evidence that his motor skills were impaired while he was seated in the vehicle prior to the field sobriety tests, buttresses this Court's conclusion that field sobriety tests are the least intrusive means of effectively verifying or dispelling an officer's reasonable suspicion. The Hawaii Supreme Court has held that field sobriety tests are designed and administered to avoid the shortcomings of casual observation and are premised upon the relationship between intoxication and the externally manifested loss of coordination it causes. *State v. Wyatt,* 687 P.2d 544, 551 (Haw. 1984). Field sobriety tests "essentially require a suspected driver to go through prescribed routines so his physical characteristics may be observed by the police." *Id.*

Thus, Ferreira's suggested "least intrusive means" of investigating a driver for DUI, by further questioning, is both unreasonable and potentially unreliable. Therefore, we hold that field sobriety tests are the least intrusive means *reasonably* available to verify or dispel the officer's suspicion in a short period of time that a driver is in violation of I.C. §18-8004. *See State v. Jones,* 115 Idaho 1029, 1033, 772 P.2d 236, 240 (Ct. App. 1989) (The request to perform field sobriety tests was a reasonable attempt by the officer to obtain information confirming or dispelling the officer's suspicions that the driver was driving while under the influence.).

D. Basis for Field Sobriety Tests

Having determined that both the United States and Idaho Constitutions require reasonable suspicion that a driver is operating his or her vehicle while under the influence, or with an alcohol level in excess of .08, we turn to Ferreira's contention that the officer in the instant case did not possess reasonable suspicion that Ferreira was driving in violation of I.C. §18-8004. Ferreira argues that the odor of alcohol and Ferreira's admission that he had two glasses of wine and a cognac prior to the traffic stop were insuffient to amount to reasonable suspicion to support the field sobriety tests. The reasonable suspicion standard requires less than probable cause, but more than mere speculation or instinct on the part of the officer. *State v. Naccarato,* 126 Idaho 10, 12, 878 P.2d 184, 186 (Ct. App. 1994); *State v. Emory,* 119 Idaho 661, 664, 809 P.2d 522, 525 (Ct. App. 1991). The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the encounter. *Narracato,* 126 Idaho at 12, 878 P.2d at 186; *Mason v. Dep't of Law Enforcement,* 103 Idaho 748, 750, 653 P.2d 803, 805 (Ct. App. 1982).

In *Pick,* this Court held that the odor of alcohol on the driver's breath, the driver's slurred speech, and the driver's admitted alcohol consumption amounted to reasonable suspicion that the driver was under the influence and, thus, the administration of field sobriety tests was constitutionally proper. *Pick,* 124 Idaho at 605, 861 P.2d at 1270. Additionally, in *Jordan,* this Court similarly held that reasonable suspicion to believe a driver was under the influence was established by information that the driver had been drinking, coupled with the driver's admission of drinking. *Jordan,* 122 Idaho at 775,

839 P.2d at 42. In the instant case, Ferreira was speeding, disregarding what he admittedly knew to be the speed limit in the area. The officer, while discussing the basis of the initial traffic stop, detected an odor of alcohol and then asked Ferreira if he had been drinking. Ferreira responded that while at dinner he had two glasses of wine and a cognac. These facts are sufficient to establish reasonable suspicion that Ferreira was in violation of I.C. §18-8004.

Moreover, Ferreira's assertion that his speech was not slurred and his clothes were not disheveled does not affect the officer's reasonable suspicion that Ferreira was driving in violation of I.C. §18-8004. As stated above, I.C. §18-8004 provides for one crime with two alternative methods of proof – driving while under the influence of alcohol or driving with an alcohol level of .08 or more. *See Cheney*, 116 Idaho at 919, 782 P.2d at 42. Evidence that is relevant to the impairment theory is not necessarily relevant to the per se theory. *See State v. Andrus*, 118 Idaho 711, 713, 800 P.2d 107, 109 (Ct. App. 1990). Therefore, the officer had reasonable suspicion, based on the totality of the circumstances, that Ferreira was driving his car in violation of I.C. §18-8004 before the field sobriety tests were administered. Thus, the administration of the field sobriety tests was constitutionally sound.

III.
CONCLUSION

We hold that both the Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution require reasonable suspicion that a driver is in violation of I.C. §18-8004 before field sobriety tests can be administered. Further, we hold

that field sobriety tests are the most reasonable, least intrusive method of confirming or dispelling an officer's suspicion. Finally, we hold that, in the instant case, the officer possessed reasonable suspicion that Ferreira was driving in violation of I.C. §18-8004 before administering the field sobriety tests. Therefore, the magistrate's order suspending Ferreira's driver's license due to his refusal to submit to a breath test, pursuant to I.C. §18-8002, is affirmed.

Judge LANSING and Judge Pro Tem R.B. WOOD, CONCUR.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 24882
Ref. No. 99S-38

STATE OF IDAHO,

Plaintiff-Respondent,

v.

CARLO FERREIRA,

Defendant-Appellant.

ORDER DENYING PETITION FOR REVIEW

The Appellant having filed a PETITION FOR REVIEW on August 26, 1999 and a supporting BRIEF on September 9, 1999, seeking review of the Opinion of the Court of Appeals filed August 5, 1999; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REVIEW be, and hereby is, DENIED.

DATED this 16th day of November, 1999.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc Counsel of Record
District Court Clerk
District Court Judge Robert G. Newhouse